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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of:	)	
	)	
Implementation of Section 402(b)(1)(A)	)	
of the Telecommunications Act of 1996	)	CC Docket No. 96-187
	)	

MCI PETITION FOR RECONSIDERATION

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SUMMARY

The Commission's interpretation of "deemed lawful" is not compelled by the statutory language and is irrational and arbitrary. Since, as MCI and others explained, the phrase "deemed lawful" admits of a range of meanings, the Commission is obligated to follow the rules of statutory construction applied to ambiguous language and interpret this provision in light of its context within the statutory structure and legislative history. Properly construed, Section 204(a)(3) simply streamlines the procedures governing LEC tariff filings and establishes a rebuttable presumption having no effect on a LEC's liability for damages.

Since the Commission concludes that it "may find a tariff provision that is 'deemed lawful' under Section 204(a)(3) to be unlawful at the conclusion of a section 205 investigation or 208 complaint proceeding based on a preponderance of the evidence," "deemed lawful" establishes only a time-limited presumption. If "deemed lawful" were actually to establish a "conclusive presumption" in the sense that term is used under the Commission's reading of what it regards as the governing case law, a LEC tariff filed under Section 204(a)(3) could never be found unlawful, in any proceeding. As a practical matter, then, "deemed lawful," even under the Commission's reading, establishes only a form of rebuttable presumption.

Because "deemed lawful" establishes only a limited presumption that ultimately may be rebutted by a preponderance of the evidence, the interpretive issue facing the Commission is the extent of that presumption. The Commission therefore must reach the issues of statutory context, structure and intent that it avoided in its analysis in the

Order by incorrectly assuming that its interpretation of deemed lawful was compelled by the plain meaning of the words in that provision. As MCI demonstrated in its comments, the only interpretation of "deemed lawful" that is consistent with the structure and legislative history of the Telecommunications Act of 1996 is one under which the procedures to be applied to LEC tariffs are streamlined, rather than one that reverses a century of administrative law relating to remedies for unreasonable common carrier rates. Thus, the phrase "deemed lawful" simply establishes higher burdens for suspensions and investigations, such as by "presuming" LEC tariffs to be lawful.

The Commission should also reconsider and modify the Order's standard governing the use of protective orders in streamlined tariff proceedings. The standard provided in the Order fails to limit the LECs' ability to file cost support information under confidential cover, and is thus inconsistent with Commission rules that require dominant carriers to file public cost support. To be consistent with Commission precedent governing the confidential treatment of cost support data, a LEC should not be permitted to file cost support under confidential cover until a demonstrated level of competition has been achieved. In particular, a LEC should not be permitted to file cost support under confidential cover until it has met the Section 271(d)(3) requirements, in the case of a Bell Operating Company, or an equivalent competitive test, for other incumbent LECs.

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I. INTRODUCTION

MCI Telecommunications Corporation (MCI) hereby requests that the Commission reconsider and modify its Report and Order in the above-captioned proceeding (Order). The Order adopts rules to implement section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996 (1996 Act), which adds section 204(a)(3) to the Communications Act (the Act).

II. THE COMMISSION'S INTERPRETATION OF "DEEMED LAWFUL" IS NOT COMPELLED BY THE STATUTORY LANGUAGE AND IS IRRATIONAL AND ARBITRARY

The new subsection 3 of Section 204(a) of the Communications Act states, in part, that a new local exchange carrier (LEC) streamlined tariff "shall be deemed lawful and shall be effective" 7 or 15 days, as the case may be, "after the date on which it is filed ...

unless the Commission takes action under paragraph (1) before the end of that ... period."

The Commission finds that this provision

> must be read to mean that a streamlined tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect. ... [W]e do not find, however, that the Commission is precluded from finding, under section 208, that [such] a rate will be unlawful if a carrier continues to charge it during a future period....
>
> ... [T]ariff filings that take effect, without suspension, under section 204(a)(3) that are subsequently determined to be unlawful ... would not subject the filing carrier to liability for damages for services provided prior to the determination of unlawfulness.[1]

For reasons that MCI and others presented in the record, but that were ignored by the Commission in its analysis, this interpretation is irrational and internally inconsistent. Contrary to the Commission's belief, its reading is not "compelled by the language in the statute"[2] and, in fact, flies in the face of the clear intent of subsection 3. Since, as MCI explained, the phrase "deemed lawful" admits of a range of meanings, the Commission is obligated to follow the rules of statutory construction applied to ambiguous language and interpret this provision in light of its context within the statutory structure and legislative history. Properly construed, Section 204(a)(3) simply streamlines the procedures governing LEC tariff filings and establishes a rebuttable presumption having no effect on a LEC's liability for damages.

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[1] Order at ¶¶ 19-20.

[2] Id. at ¶ 24.

A. The Commission's Interpretation of "Deemed" is Not Compelled by the Statutory Language

The Commission's analysis proceeds from its view that

> [g]iven the unambiguous meaning of the term "deemed lawful," we see no reason to resort to the legislative history ... in concluding that this term denotes a conclusive presumption. In light of this statutory language as viewed under relevant appellate case law, we find that this interpretation is required in order to give effect to the language of the statute and therefore decline to adopt the alternative interpretation suggested in the Notice.[3]

The Commission's predicate, however -- that "deemed" and "deemed lawful" can have only one possible meaning -- is incorrect. In fact, "deemed"

> is not an unusual word, but a common one, and has acquired no technical or peculiar signification, but it is a word of various meanings, often dependent on the circumstances in connection with which it is used ....[4]

As MCI pointed out in its ex parte letter of December 16, 1996,[5] quoting the Commission:

> "Where the subject matter to which words refer is not the same in the several places where they are used, or the conditions are different .... the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed."[6]

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[3] Id. at ¶ 19.

[4] 26A C.J.S. Deem (1956).

[5] Letter from Frank W. Krogh, MCI, to William F. Caton, Secretary, FCC, dated Dec. 16, 1996.

[6] New England Public Communications Council Petition for Preemption Pursuant to Section 253, FCC 96-470, CCBPol 96-11 (released Dec. 10, 1996), at ¶ 24 n. 72 (quoting Atlantic Cleaners and Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932)).

"In every case ... the meaning of statutory language, plain or not, depends on context."[7]

In other contexts, Congress has used "deemed" to mean something other than creating an immutable status applicable to all situations. See, e.g., Conoco, Inc. v. Skinner, 970 F.2d 1206, 1224-25 (3rd Cir. 1992) (statutory provision "deeming" a ship owning corporation a citizen was not meant to render the corporation a citizen for all purposes, because such a construction would yield harsh or absurd results); Davis v. Califano, 603 F.2d 618, 621 (7th Cir. 1979) (construing 42 U.S.C. §416(h)(1)(B), wherein Social Security benefits to spouse "deemed" a widow are terminated once a "legal widow" has applied for the benefits). The Commission is therefore incorrect in asserting that its interpretation is compelled by the language of Section 204(a)(3). Its citation of Chevron[8] adds nothing, since, as these authorities demonstrate, "deemed" is a word that "may vary," and has varied, "to meet the purposes of the law" in which it appears.

B. The Commission's Interpretation of "Deemed Lawful" Concedes That it Establishes Only a Limited Presumption

As MCI also pointed out in its ex parte letter, an interpretation under which tariffs that are "deemed lawful" may later be found unlawful constitutes only a limited presumption. The Commission states in the Order that "tariff provisions that are deemed

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[7] Henke v. United States Dep't of Commerce, 83 F.3d 1453, 1459 (D.C. Cir. 1996)(quoting King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991)).

[8] Chevron USA, Inc. v. NRDC, 104 S.Ct. 2778 (1984).

lawful when they take effect may ... be found unlawful subsequently in section 205 or 208 proceedings."[9] Since "the Commission may find a tariff provision that is 'deemed lawful' under section 204(a)(3) to be unlawful at the conclusion of a section 205 investigation or 208 complaint proceeding based on a preponderance of the evidence,"[10] "deemed lawful" establishes only a time-limited presumption. If "deemed lawful" were actually to establish a "conclusive presumption" in the sense that term is used under the Commission's reading of what it regards as the governing case law,[11] a LEC tariff filed under Section 204(a)(3) could never be found unlawful, in any proceeding. As a practical matter, then, "deemed lawful," even under the Commission's reading, establishes only a form of rebuttable presumption.

Because LEC tariffs that are "deemed lawful" may be found unlawful subsequently, thereby effectively establishing only a rebuttable presumption, the Commission has undermined any argument that the statutory language compels a particular interpretation. Since "deemed lawful" establishes only a limited presumption that ultimately may be rebutted by a preponderance of the evidence, the interpretive issue facing the Commission is the extent of that presumption. The difference between the Commission's reading and the alternative interpretation suggested in the Notice is one of degree -- whether the filing LEC may be subjected to damages, once the presumption is

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[9] Id. at ¶ 21.

[10] Id. at ¶ 23.

[11] See id. at ¶ 19.

rebutted, for the entire period that the tariff has been in effect or is subject only to prospective damages at that point. There is nothing in the statutory language or the Commission's discussion of the case law that suggests that the particular limited presumption chosen by the Commission is compelled by the statutory language over some other limited presumption.

C. Under the Principles of Statutory Construction Ignored in the Report and Order, "Deemed Lawful" Establishes Only a Rebuttable Presumption That Allows for the Imposition of Full Damages Liability From a Tariff's Effective Date

Given that "deemed lawful" is susceptible to a range of interpretations -- all of them establishing rebuttable, limited presumptions -- the Commission is obligated to interpret that phrase according to the principles of statutory construction applicable to ambiguous language. In expounding this provision, the Commission "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[12] "[C]ongressional intent can be understood only in light of the context in which Congress enacted a statute and the policies underlying its enactment."[13] The Commission therefore must reach the issues of statutory context, structure and intent that it avoided in its analysis in the Order by incorrectly assuming that its interpretation of deemed lawful was compelled by the plain meaning of the words in that provision.

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[12] Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956).

[13] Tataronowicz v. Sullivan, 959 F.2d 268, 276 (D.C. Cir. 1992).

As MCI demonstrated in its comments, the only interpretation of "deemed lawful" that is consistent with the structure and legislative history of the 1996 Act is one under which the procedures to be applied to LEC tariffs are streamlined, rather than one that reverses a century of administrative law relating to remedies for unreasonable common carrier rates. Thus, that phrase simply establishes higher burdens for suspensions and investigations, such as by "presuming" LEC tariffs to be lawful.

By choosing to characterize the tariff review process established by Section 204(a)(3) as "streamlined procedures for changes in charges, classifications, regulations, or practices,"[14] Congress was making a clear reference to the Commission's past use of the term "streamlined" in the context of tariff review. In both the Competitive Carrier and Price Cap dockets, the Commission characterized a tariff review process as streamlined if it incorporated both 1) shortened notice periods, and 2) a rebuttable presumption of lawfulness[15] (under which the carrier could still be liable for damages from the effective date of the tariff). The new Section 204(a)(3) was intended to afford similarly streamlined review to all LEC rate increases and decreases.

It certainly could not be argued that the streamlining effectuated by Section 204(a)(3), properly read, does not bring about substantial benefits to LECs filing tariffs. This provision extends the presumption of lawfulness not only to within-band filings by

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[14] See Section 402(b)(1) of the 1996 Act.

[15] See, e.g., First Report and Order, Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, 85 FCC 2d 1, 30-40 (1980); Report and Order and Second Further Notice of Proposed Rulemaking, Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3095 (1989).

price cap LECs, but also to out-of-band and above-cap filings, and to rate changes proposed by rate-of-return carriers. In addition, the shorter notice periods and the foreclosure of the Commission's 203(b)(2) deferral authority will allow LEC rate changes to take effect more quickly. Price cap LECs will be permitted to decrease within-band rates on only 7 days notice, and to file out-of-band or above-cap rates on only 7 or 15 days notice, while rate of return carriers will enjoy substantially shorter notice periods than the 35 or 45 days prescribed by the Commission's existing rules.

That the purpose of Section 204(a)(3) was to speed up the pre-effective review of LEC rate increases and decreases, rather than eviscerate the complaint remedy, is confirmed by the Joint Explanatory Statement of the Committee on Conference. It states that the new subsection "streamlines the procedures for revision" of LEC tariffs, strongly indicating that Congress was concerned primarily with reducing barriers to LEC tariff changes. Senator Dole's statements on the floor of the Senate that the new provision would "[s]peed up FCC action" and that "[t]o block such changes, the FCC must justify its actions" further support the interpretation that "deemed lawful" establishes higher burdens for suspension.[16]

A policy of shorter notice periods and reduced risk of suspension is consistent with the pro-competitive goals of the 1996 Act. With Section 402(b)(1)(A), Congress provided the LECs with the ability to adjust their rates more rapidly, allowing sufficient flexibility to respond to competitors entering the local exchange and exchange access

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[16] See Notice at ¶ 4 & n.11, quoting Joint Explanatory Statement and Senator Dole.

markets under the Section 251-252 framework. However, Congress left in place the key components of the Act's tariffing procedures: the LECs must file tariffs, the Commission may exercise pre-effective review, and customers may obtain damages under the Section 207-208 complaint process. Congress recognized that the LECs' market power will not evaporate overnight and that continued Commission scrutiny of tariffs before they go into effect, coupled with the Act's complaint remedies, is required to ensure that incumbent LEC tariffs are just, reasonable, and nondiscriminatory.

Under the Commission's interpretation, however, Congress intended to drastically limit the Section 208 complaint remedy for unreasonable or discriminatory LEC tariff rates, without any mention of such a major shift in the legislative history or Section 208 itself. It is inconceivable that such an overhaul limiting the Section 208 remedy would have intended to be effectuated without any mention in Section 208, especially since Section 208 was also amended by Section 402(b) of the 1996 Act. Section 402(b)(1) of the 1996 Act not only amends Section 204(a), but it also amends Section 208(b) to shorten the deadline for the resolution of complaints. The placement of these amendments to Sections 204 and 208 together in the same subsection of the 1996 Act, headed "streamlined procedures for changes in charges, classifications, regulations, or practices," demonstrates that tariffs filed on a "streamlined basis" pursuant to Section 204(a)(3) remain subject to all of the complaint remedies provided under Section 208(b).

This coupling is reinforced by the language of Sections 204(a)(3) and 208(b). The "new or revised charge[s], classification[s], regulation[s], or practice[s]" filed by LECs that are "deemed lawful" under Section 204(a)(3) are clearly intended to be included in

the "charge[s], classification[s], regulation[s] or practice[s]" subject to all complaint remedies, including full damages, under Section 208(b). The Commission's interpretation is therefore inconsistent with the structure and intent of the 1996 Act.

Moreover, under the Commission's interpretation, a decision not to suspend, which today is non-final and nonreviewable, would be judicially reviewable once affirmed by the full Commission. Judicial review is appropriate in cases involving agency "orders of definitive impact, where judicial abstention would result in irreparable injury...."[17] Typically, agency orders allowing tariffs into effect are unreviewable because: such orders are interlocutory actions involving no determination on the merits; review is not necessary to prevent irreparable injury, since there is still the possibility of refunds or damages; and judicial intervention would invade the province reserved to agency discretion.[18] In Southern Railway, the Supreme Court found that an Interstate Commerce Commission decision not to suspend was non-final and unreviewable because the complaint procedure was still available.[19] Relying on Southern Railway, the court in Aeronautical Radio found that a Commission decision to accept a tariff filing was not

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[17] Papago Tribal Utility Authority v. FERC, 628 F.2d 235, 238 (D.C. Cir.), cert. denied, 101 S.Ct. 784 (1980).

[18] Id. at 239-40. See also, Aeronautical Radio v. F.C.C., 642 F.2d 1221, 1234 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981).

[19] Southern Railway Co. v. Seaboard Allied Milling Corp. et. al., 442 U.S. 444, 454 (1979)(Southern Railway).

subject to judicial review because "a complaint procedure comparable to that of the Interstate Commerce Act is available. . ."[20]

Under the Commission's radical misreading of Section 204(a)(3), however, these criteria -- finality, irreparable injury and agency discretion -- would require the opposite result in the case of an appeal of a Commission affirmance of a decision not to suspend a LEC streamlined tariff. With respect to finality, "an agency order is final for purposes of appellate review when it imposes an obligation, denies a right, or fixes some legal relationship...."[21] If the Commission is right about Section 204(a)(3), an order allowing a streamlined LEC tariff into effect certainly "denies a right" to damages. Such a determination would be final, not interlocutory, since damages from the effective date of the tariff would never be available.

Similarly, "irreparable injury" can be shown where a party has "no practical means of procuring effective relief after the close of the proceeding"[22] or can "prove the existence of a 'concrete, perceptible harm of a real, non-speculative nature.'"[23] Since damages from the effective date of a streamlined LEC tariff that takes effect without suspension will never be available, no matter how unreasonable the rates established thereby, anyone paying such rates can show a "'concrete, perceptible harm'" for which no

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[20] Aeronautical Radio, 642 F.2d at 1235.

[21] Papago, 628 F.2d at 239.

[22] Id. at 240.

[23] North Carolina Utilities Commission v. FERC, 653 F.2d 655, 662, 668 (D.C. Cir. 1981)(quoting Public Citizen v. Lockheed Aircraft Corp., 565 F.2d 708, 716 (D.C. Cir. 1977)).

"effective relief" can ever be procured. Finally, appeal of such an order would not invade the province of the agency, since there can be no Commission proceeding in which damages from the effective date of the tariff will be addressed. Petitioners thus will have the right to seek judicial review of a Commission decision not to suspend a LEC tariff transmittal filed under the Section 204(a)(3) streamlined review procedures.

The creation of a judicially reviewable decision not to suspend would have disruptive practical consequences. As the Supreme Court noted in Southern Railway, "[i]f the Commission ... must carefully analyze and explain its actions with regard to each component of each proposed schedule ..., all in order to avoid ... reversal, its workload would increase tremendously."[24] The Court also discussed the disruptive consequences that would be created by "the allowance for independent judicial appraisal of the reasonableness of rates by every court of appeals in the country...."[25] Thus, the Commission's proposed interpretation of "deemed lawful" is inconsistent with any realistic conception of "streamlined" review.

Another irrational result of the Commission's interpretation is that while monopoly LEC access tariff rates are immune from any liability for damages from the effective date of the tariff, competitive carriers' rates, including competitive LEC (CLEC) and interexchange carrier (IXC) rates, remain fully vulnerable to liability for damages, whether or not they are tariffed. To subject competitive carriers' rates to more stringent

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[24] Southern Railway, 442 U.S. at 457.

[25] Id. at 460.

remedial provisions than LEC monopoly rates in such a manner turns the entire regulatory regime on its head. That is surely not "the balance between consumers and carriers that Congress struck" in Section 204(a)(3).[26] Under the rules of statutory construction discussed above, an interpretation that "compel[s] an odd result" must be rejected.[27] Such "odd result[s]" would not follow from the appropriate interpretation of "deemed lawful," which would streamline procedures for LEC tariffs while subjecting them to the same complaint remedies that are available against all other carriers.

It is especially irrational to release the LECs from the disciplining effect of the complaint damages remedy at this juncture, when the industry is in such a state of flux and IXCs and others are beginning to gain a toehold in the local exchange market. The Bell Operating Companies (BOCs) and other LECs are especially motivated to exploit their remaining market power in ways that will forestall such competitive entry by carriers who are still dependent on the LECs for access services. As the LECs are released from more and more regulatory restraints, one of the few ways that competitive carriers and other ratepayers can still protect themselves is through the complaint process. If they are deprived of the damages remedy, the LECs will have even less incentive to refrain from anticompetitive pricing and other tariffing strategies.

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[26] Order at ¶ 20.

[27] American Train Dispatchers Ass'n v. ICC, 54 F.3d 842, 849 (D.C. Cir. 1995).

Moreover, to allow all CLECs to file under this provision, as indicated in the Order,[28] would not ameliorate the irrationality of the Commission's interpretation. If a CLEC were to file under this provision, it would have to forego other benefits. In the event that the Commission forbears from requiring CLECs to file tariffs, a CLEC would have to give up all of the benefits of such forbearance in order to take advantage of the damages immunity provided by the Commission's interpretation of Section 204(a)(3), thereby presenting a Hobson's choice. If CLECs continue to have to file tariffs, they would still have to forego the flexibility of one-day notice and filing without cost support in order to file under Section 204(a)(3).

The effect of the Commission's interpretation is therefore to impose greater sanctions on competitive carriers than on the incumbent LECs, or, at least, to require competitive carriers to choose between the risk of damages liability and increased rate review burdens. Congress could not have intended such an absurd result. Since the language of the provision does not require such a result, the Commission is required to interpret it in a more rational manner that is consistent with the purpose and structure of the 1996 Act. An interpretation of "deemed lawful" under which the complaint remedy would continue to apply to LEC streamlined tariffs is therefore the only one that is consistent with the language, intent and structure of the 1996 Act.

D. In the Event That the Commission Does Not Reconsider its Interpretation of "Deemed Lawful," It Should Undertake to Resolve All

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[28] Order at ¶40.

Complaints Against LEC Streamlined Tariffs on an Expedited Basis

Given the immunity from damages that will be enjoyed by the LECs as to their monopoly access rates under the Commission's interpretation of "deemed lawful," the Commission should at least pledge to resolve all Section 208 complaints against LEC streamlined tariffs on an expedited basis if it does not reconsider that interpretation. Since damages cannot be obtained for the period prior to the date that such a tariff is found unlawful, a complainant, as well as all other ratepayers, is irreparably harmed during that period. It is therefore incumbent on the Commission to make sure that such period is minimized. Unreasonable and discriminatory LEC rates during this transitional period could derail the incipient local competition that is now developing. Because of the absence of a damages remedy, the threat to competition from an unreasonable LEC tariff rate requires as speedy a response by the Commission as Section 271 provides in the case of a BOC's failure to continue meeting the requirements for in-region interLATA service authority. Accordingly, the Commission should undertake to resolve all such complaint proceedings in the 90 day period applicable to violations of Section 271.[29]

III. THE COMMISSION SHOULD RECONSIDER THE PROTECTIVE ORDER PROVISIONS

Pursuant to the Order, a LEC will be permitted to submit cost support data under confidential cover if it includes "a showing by a preponderance of the evidence to support its case that the data should be accorded confidential treatment consistent with the

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[29] See Section 271(d)(6) of the Communications Act.

provisions of the FOIA" or "makes a sufficient showing that the information should be subject to a protective order."[30] This standard places no real limits on the LECs' ability to file cost support under confidential cover. First, the "sufficient showing" test is undefined. More importantly, as the Commission notes in the Order, the Bureau will not have time to examine the LECs' confidentiality requests or issue written determinations concerning whether the data are entitled to confidential treatment.[31] Thus, in practice, LECs will be permitted to withhold public cost support data as long as they provide the basic information required by Sections 0.459(b) and (c) of the Commission's rules,[32] which is meaningless in the absence of the Commission review of such information that is required by Section 0.459(d).

The Commission should reconsider and modify the Order's standard governing the use of protective orders in streamlined tariff proceedings. Because the standard provided in the Order fails to limit the LECs' ability to file cost support information under confidential cover, it is inconsistent with Commission rules that require dominant carriers to file public cost support. The Commission has specifically stated that "the Commission's established practice is to require public filing of cost support for tariffs."[33]

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[30] Order at ¶91.

[31] Id.

[32] Id.

[33] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Common Carrier Bureau 1992), review denied, 9 FCC Rcd 180 (1993) (SCIS Disclosure Review Order), recon. denied, Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, FCC 95-27 (released February 14, 1995).

Furthermore, Section 0.455(b)(11) of the Commission's rules provides that tariff schedules, all documents filed in connection therewith, and all communications related thereto shall be publicly available. The Order, however, would effectively exempt the LECs from the requirement that cost support be public.

Nothing in Section 204(a)(3) compels a departure from the requirement that dominant carriers file public cost support. Commission precedent clearly indicates that limitations on the public filing of cost support are appropriate only when the LEC has demonstrated that the information is competitively sensitive. In the SWBT Suspension Order, for example, the Bureau established that LECs must "link" the confidential data they seek to protect to specific examples of competitive harm in the form of "actual competition and a likelihood of substantial competitive injury."[34] Under current competitive conditions, incumbent LECs could not, in general, make this showing. Accordingly, there is no justification for the Order's wholesale exemption of incumbent LECs from the public cost support requirements.

To be consistent with Commission precedent governing the confidential treatment of cost support data, a LEC should not be permitted to file cost support under confidential cover until a demonstrated level of competition has been achieved. In particular, a LEC should not be permitted to file cost support under confidential cover until it has met the Section 271(d)(3) requirements, in the case of a Bell Operating Company, or an

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[34] In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal Nos. 2470, 2489, Order Initiating Investigation, 10 FCC Rcd 12639 (SWBT Suspension Order).

equivalent competitive test, for other incumbent LECs. This level of competition would contribute to establishing a presumption that the incumbent LEC's cost support information is competitively sensitive. Only then should the incumbent LEC be permitted to require interested parties to enter into a protective agreement.

The use of a competitive test is consistent with the reduced notice periods of Section 204(a)(3). Public cost support requirements do not, as the Order seems to suggest, have to be eviscerated because the 7 or 15 day notice periods do not allow sufficient time to evaluate confidentiality requests on a case-by-case basis.[35] The need to evaluate confidentiality requests on a case-by-case basis would also be avoided by a prior Commission determination of competitive conditions in the LEC's service area. Until a competitive test such as the Section 271(d)(3) standard is met, the LEC should be required to file cost support on the public record because there is little risk of competitive harm. Then, if competition sufficient to meet the Section 271(d)(3) standard developed, the Commission could grant the LEC the authority to require interested parties to enter into protective agreements.

IV. THE COMMISSION SHOULD REQUIRE LECS TO ENTER INTO STANDING PROTECTIVE AGREEMENTS

In order to facilitate the review of documents associated with a tariff transmittal, the reviewing party must agree to be bound by the terms of the standard protective

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[35] See Order at ¶¶91-92.

agreement provided in Appendix B of the Order.[36] For each transmittal, LEC customers must obtain the transmittal, determine that cost support has been submitted under confidential cover, contact the LEC representative, arrange to enter into a protective agreement, inspect the confidential information, and then request copies of the confidential information.

This cumbersome and time-consuming process would compromise the ability of LEC customers to review LEC tariffs in 3 or 7 days. For this reason, the Commission should give customers the option of entering into a standing protective agreement with the LEC. Under a standing protective agreement, the reviewing party would not be required to enter into a separate protective agreement as each transmittal is filed. Instead, the submitting party would automatically provide a copy of any confidential information associated with each tariff transmittal to the reviewing party's authorized representative, coincident with the filing of this information with the Commission. All other terms of the standing protective agreement would be the same as those in the Commission's model protective agreement. Thus, the use of a standing protective order would simplify review while maintaining the same level of confidential treatment for LEC cost support.

V. THE TARIFF STREAMLINING PROVISIONS APPLY ONLY TO EXCHANGE ACCESS SERVICES

Pursuant to Section 204(a)(3), "local exchange carriers" may file tariffs on a streamlined basis. The Commission should clarify that the tariff streamlining provisions

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[36] Order at ¶91.

of Section 204(a)(3) apply to LECs only to the extent that they are providing exchange access services, and that Section 204(a)(3) does not give LECs the authority to file interstate interexchange tariffs on a streamlined basis. Under the Act, the definition of "local exchange carrier" refers only to the provision of telephone exchange service or exchange access. Furthermore, it would be anomalous for dominant LECs' interexchange tariffs to be "deemed lawful" while tariffs filed by interexchange carriers without local exchange operations would be denied the same status.

VI. MID-YEAR EXOGENOUS COST CHANGES

In the Order, the Commission concludes that Tariff Review Plans, including exogenous cost and PCI calculations, must be filed in advance of the annual access filing.[37] The Commission rejects arguments that the early submission of TRP information is inconsistent with the streamlined notice provisions of Section 204(a)(3).[38]

The Commission should clarify that it also has the authority to require advance filing of PCI calculations associated with mid-year exogenous cost changes. Early filing of the PCI calculations associated with mid-year exogenous cost changes is necessary to facilitate review of these PCI changes. In many cases, considerable cost data and complex calculations underlie mid-year PCI changes. If these PCI calculations were submitted at the same time as associated rate changes filed pursuant to Section 204(a)(3),

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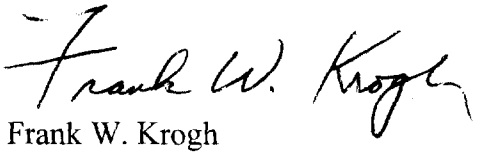
[37] Order at ¶101.

[38] Order at ¶102.

the Commission and interested parties would not have sufficient time to review these calculations. This problem would be especially acute if an exogenous cost change led to a rate decrease filed on 7 days' notice.

Respectfully submitted,
MCI TELECOMMUNICATIONS CORPORATION



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